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Supreme Court, U.S.
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NO. 84-2027

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION — PETITIONER

v.

PAUL RUIZ and EARL VAN DENTON — RESPONDENTS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

Respondents concur with Petitioner's Statement of the Case.

ARGUMENT

1. WHETHER THE EIGHTH CIRCUIT'S RULING ON THE RESPONDENTS' GRIGSBY CLAIM WAS A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner contends that the issue of death qualified juries (commonly referred to as the Grigsby claim) as enumerated in Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985), should not apply to the case at bar because it was procedurally barred. In particular, the Petitioner contends that though the issue was raised at trial, it was not argued on appeal sufficiently to preserve the issue. Citing Wainwright v. Sykes, 433 U.S. 72 (1977). Petitioner contends that the issue was not disposed of on its merits by the State Court and therefore cause and prejudice would have to have been shown for it to be permitted to be introduced in the habeas proceeding pursuant to 28 U.S.C. §2254.

Arkansas follows the rule that if an issue is not raised at trial or on direct appeal, it is waived. See Hulsey v. State, 268 Ark. 312, 595 S.W.2d 934 (1980). However, in this proceeding, all requirements were met. It is without dispute that the issue was raised at trial and the hearing was requested. No hearing was granted by the trial court, in fact this point was agreed to by the parties in the Designated Record at page 21. Petitioners contends that the issue was not

properly raised on appeal to the Arkansas Supreme Court and therefore it was waived. A review of the record clearly indicates that it was raised sufficiently on appeal.

Respondents raised seven major issues on appeal, last of which was "Other Objections Raised during the Trial but not Argued on Appeal". The brief of Respondents stated:

> Counsel requested a hearing on whether juries qualified to render a death penalty are prosecution prone. The hearing was denied. R. 502-503. Ruiz feels that he should have had hearing, but in light of this Court's rulings in other cases on this point, it is not raised in this appeal.

It is clear, that Respondent properly raised this issue for the Court's consideration pursuant to its own rules. In the opinion issued by the Arkansas Supreme Court, they did not address the Grigsby issue directly but in ruling upon issues raised in the briefs stated:

> Counsel for Appellants and for Appellee, following our rules have sided and commented on many objections raised below, but not argued on appeal. It would be of no value to list them singly as we find on prejudical errors.

Ruiz v. State, 273 Ark. 94, 106 617 S.W.2d 6, 13 cert. denied 454 U.S. 1093 (1981).

The Eighth Circuit ruled that this was a holding on the merits concerning the Grigsby case.

The Arkansas Supreme Court has, pursuant to Ark. S. Ct. Rule 11(f), required that in any case where death or life

imprisonment is given all errors prejudical to the appellant must be listed and abstracted for the Court's consideration. Obviously, the Court has done this to protect a defendant who faces the worst of all possible penalties, death or life without parole. Certainly, the State cannot require a listing for review of such issues and then claim later that what is listed pursuant to those rules is insufficient. The argument of Petitioners clearly without merit.

A review of the presentation of the issue on appeal further verifies that the issue was raised for the Court's consideration. Respondent claims that based on the Court's prior decisions, not much more needed to be stated except that the issue was raised and it is an issue for reversal. It did not take a crystal ball on behalf of Respondent that the issues would fall on deaf ears. See Hendrickson v. State, No. CR-84-164 (Ark. April 29, 1985); Rector v. State, 280 Ark. 385 659 S.W.2d 168 (1983). Those cases clearly indicate that the position of Respondent concerning the Court's view of the death qualified jury issue was one that they had already decided.

The claim of Petitioner that this interpretation of Rule 11(f) of the Arkansas Supreme Court Rules is unduly burdensome certainly is without merit. When the person's life or death is at stake, the Court should proceed with extreme caution to make sure that the conviction is proper. The only

way the claim of the Petitioner could have merit would be have the issue not been listed at all. Respondent would contend that if that had happened the issue would have been waived, but since it was raised at trial and presented to the Arkansas Supreme Court pursuant to its own rules for consideration, the claim of the Petitioner is without merit and the Court should not consider that issue a reason for granting a Writ.

2. WHETHER THE EIGHTH CIRCUIT'S HOLDING IN MABRY V. GRIGSBY PRESENTS SIGNIFICANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

It goes without saying that the statement of Petitioners concerning the split of the Circuits on the death qualified juror issue is correct. Also, the Grigsby decision is in direct conflict with decisions of the Arkansas Supreme Court. See Hendrickson v. State, 84-164 (Ark. April 29, 1985); Rector v. State, 280 Ark. 385 659 S.W.2d 168 (1983). Quite possibly this split can only be rectified by a decision from this Court. Respondent would contend, however, that the disposition of this issue does not require putting this case on hold pending the outcome of Lockhart v. McRee, U.S.L.W. (U.S. May 29, 1985) (No. 84-1865) and/or Keeten v. Garrison, _____ U.S.L.W. _____ (U.S. Feb. 2, 1985) (No. 84-6187). The Courts can properly rule on this petition prior to making a final disposition on the previous mentioned cases.

3. WHETHER THE EIGHTH CIRCUIT PROPERLY INTREPRETED THIS COURT'S DECISIONS IN APPLYING MABRY V. GRIGSBY RETROACTIVELY.

After the Eighth Circuit returned it decision in Grigsby, it determined that Grigsby should be applied retroactively. In Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985), the issue of retroactivity was addressed and the Eighth Circuit determined that it should be applied to the cases which have previously raised the Grigsby issue. The Eighth Circuit determined, citing Solem v. Stumes, 104 S.Ct. 1338 (1984), that retroactivity depends on three factors:

a) the purpose to be served by the new rule;

b) the extent to which law-enforcement authority have relied on the older rule of law; and

c) the effect on the administration of justice to a retroactive application of the new rule.

104 S.Ct. at 1341.

The Eighth Circuit, compared Grigsby to Witherspoon v. Illinois, 391 U.S. 510 (1968), on occasion in which this Court applied Witherspoon retroactively to protect the "integrity of the process". The Eighth Circuit ruled that the issue in Grigsby was certainly as important, even maybe more so. The Grigsby decision strikes at the very truth finding function of the trial by jury. Woodard at 696. Using the three criteria enumerated above, certainly the purpose to be served by the new rule is to

guarantee defendants that they will be tried by a completely impartial jury. The fact that law enforcement authorities in the past may have relied on previous rulings is not sufficient to deprive defendants of their Sixth Amendment rights to a fair trial. Finally, the effect on the administration of justice, though heavy in this case, does not justify permitting defendants to go to trial with a conviction prone trier of fact. Further, based upon Grigsby there is certainly that possibility that many of the guilty verdicts in the past may have not been accurate. The lives of defendants require that all constitutional safeguards are zealously protected. The additional cost and inconvenience to separate state must not be used to deprive Respondents and others in their situation of their constitutional protections.

CONCLUSION

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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